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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-1844

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UNION ELECTRIC COMPANY,  
*Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY.

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Eighth Circuit

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**PETITIONER'S REPLY TO BRIEF FOR THE  
ENVIRONMENTAL PROTECTION AGENCY  
IN OPPOSITION**

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WILLIAM H. FERRELL  
314 North Broadway  
St. Louis, Missouri 63102  
*Counsel for Petitioner*

STEWART W. SMITH, JR. AND  
SCHLAFLY, GRIESEDIECK,  
FERRELL & TOFT  
*Of Counsel*

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In this reply we direct our attention to new material in the Environmental Protection Agency (EPA) brief, which is significant and either factually or legally inaccurate. And in doing so we divide our reply between the three headings on pages 2 et seq. of such brief.

**QUESTION PRESENTED**

The EPA has abbreviated its statement of the question presented so as to exclude the facts in this case which give rise

to the constitutional issue. Thus the EPA's emasculated statement would be correct if it were qualified and followed by these facts

"(1) when by such enforcement the source and its responsible corporate officers incur the risk of severe and confiscatory civil and criminal penalties, (2) when the source is legally testing the validity of the application to it of those emission limitations and (3) when the source's actual emissions present no danger to the public health or welfare—indeed when, as here, it is admitted by all parties that such actual emissions do not impair the maintenance of National Ambient Air Quality Standards."

As so qualified the question presented is an accurate and fair one. As emasculated by the EPA, it is neither.

#### STATEMENT

While the EPA's statement is not wholly correct, the inaccuracies are principally factual omissions revolving around the EPA's refusal (as stated in the preceding section of this brief) to recognize the existence of those facts which give rise to an important constitutional question. Since these facts have been stated in our Petition for Certiorari (pp. 2 et seq.), we do not believe this Court should consider itself impeded by any lack of them in resolving our certiorari request.

#### ARGUMENT

Respondent EPA commences its argument by stating that "the ruling of the court of appeals is unlikely even to cause petitioner any inconvenience" (p. 4 of EPA brief). The apparent basis for this statement is the September 1978 letter from the "Director, Enforcement Division, EPA Region VII" to Petitioner, which said, among other things, that "EPA will not initiate any enforcement proceedings against (Petitioner) relative to violations of the federally approved sulfur dioxide regulation until EPA, Region VII has informed (Petitioner) in writing of its decision regarding a recommended approval or disapproval of the variance, which would of course be followed by a notice of proposed rulemaking and public comment period."<sup>1</sup>

Although the EPA characterizes its non-enforcement letter as "voluntary," it should be pointed out that at the time it was written a Federal District Court order prohibited enforcement and since that time the issue has been in litigation before the federal courts. The "stay" granted by the EPA is illusory because it could be revoked at any time (and probably would be if the issue was not in litigation).

The Clean Air Act Amendments of 1977 (42 U.S.C. Section 7413) authorize the EPA Administrator to seek civil and criminal penalties 30 days after notifying a party of alleged violations. Petitioner has been notified and the 30 days have expired. The "stay" can be revoked at any time and Petitioner will be liable from that date forward to draconian penalties prescribed by the Amendments. Due process of law should not be dependent upon the whim of the EPA Administrator.

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<sup>1</sup> See pages 3-4 of EPA brief.

It is apparent that the EPA staff does not intend to adhere to the fundamental rights of due process. In its nonenforcement letter, the EPA staff states that the "stay" would continue only until it makes a recommendation, not until a final decision is made. It is willing to subject the Petitioner to the severe penalties prescribed by the Amendments before the decision making process is complete.

Issuance of the "notice of violation" in January 1978 commenced the process prescribed under the Clean Air Act Amendments. It is imperative that the Petitioner not be subject to the whim of the EPA in deciding when it will commence enforcement actions. A judicially-enforceable stay is required by the holding in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908). The constitutional protection recognized by this Court in that case is against the risk of incurring severe and confiscatory fines and penalties, when, as here, petitioner and its officers must pass upon the question at their own risk.<sup>2</sup>

On page 5 of its brief the EPA refers to this Court's observation in *Union Electric v. EPA*, 427 U.S. 246, 266 (1976) that

"Congress intended that judicial consideration of claims of economic and technological infeasibility under the Act should occur only when it 'will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards'."

But as we have previously pointed out, consideration of such claims in the instant case will not interfere in any respect with the congressional purpose of attainment (or of maintenance for that matter) of national air quality standards. This is necessarily true, since all parties admit that a continuance of

<sup>2</sup> See *Wadley Southern R. Co. v. Georgia*, 235 U.S. 651, 35 S.Ct. 214, 218 (1915) and the quotation therefrom on p. 10 of the Pet. for Cert.

present SO<sub>2</sub> emissions will not interfere, substantially or otherwise, with the maintenance of such standards.

Unquestionably the most mystifying aspect of this case is the establishment and enforcement as federal law of emission limitations which are not geared to national air quality standards, but which are mandated by states and which may satisfy any state whim.<sup>3</sup> We respectfully submit that the U.S. Constitution, and this Court's interpretation of it in *Ex parte Young*, cited supra, demand the striking of a better balance.

On page 6 of its brief, the EPA says:

"Here, Missouri law provided petitioner with an opportunity to challenge the State Implementation Plan, but petitioner failed to take advantage of the statutory procedure for obtaining judicial review."

This statement is rather cryptic to us, since at the time this suit was filed and for some time prior thereto petitioner had been seeking a variance from the Missouri Air Commission as to its Labadie and Sioux Plants. And in the *Union Electric* case, cited supra, this Court specifically held that such a procedure was an appropriate method to obtain relief from emission regulations (427 U.S. at 266). This Court also there pointed out (n. 15 at p. 266) that a variance is approvable by the EPA as a revision of the State Implementation Plan.<sup>4</sup>

Although the EPA brief does not say so, perhaps it obtusely refers to the fact that after its May, 1972 approval of the Mis-

<sup>3</sup> In fact, if the EPA and the Court of Appeals are correct, a state can ban all emissions and the Federal Government must enforce with Draconian penalties such ban as valid and constitutional federal law.

<sup>4</sup> Our mystification is intensified by the fact (p. 3 of EPA brief) that the Missouri Air Commission has in fact granted the variance, and any delay rests with the EPA.

souri Implementation Plan, Union Electric sought variances as to its particular plants rather than a review of the State Plan in the Missouri Courts. Contrary to the EPA we have doubt that such a review is permissible. Thus we find no authority that the State Commission's promulgation of the plan constitutes an "administrative decision" under Section 203.130, R.S.Mo., 1978. In any event a possibility of state review really makes no difference. The Clean Air Act (42 U.S.C. Section 7410) contains no provision, nor does it contemplate, that the EPA shall withhold approval of the plan, while the propriety of its application to one source or another goes through a state appellate procedure. In view of the fact that the Administrator must act on the plan within four months after its submission (42 U.S.C. Sec. 7410(a)(2)) it is certainly unrealistic to think that a state appellate process would inevitably, or even often, be completed by that time. We also point out that since the Clean Air Act Amendments of 1970 and the Implementation plan approval in 1972, the facts with respect to energy have vastly changed, and justice requires governmental agencies and courts alike to recognize and deal with those facts.

In conclusion we note that the Attorney General's office has sought succor in statements we made in our brief filed in the earlier *Union Electric* case. But the constitutional question presented in that case had nothing to do with the *Ex parte Young* doctrine we present here; and additionally the Court there declined to consider the constitutional point we presented (427 U.S. at p. 269, n. 19).

#### CONCLUSION

The EPA and its counsel refer to the "spectre" of *Ex parte Young* as if it were a constitutional doctrine which must somehow be forgotten. But we respectfully submit that that doc-

trine, which is so clearly applicable here, cannot be abrogated, changed or modified by any governmental agency or department or any court of appeals. Nor can it be eliminated or changed by refusals to grant certiorari in cases where it is presented. We therefore respectfully pray that our petition for certiorari be granted.

Respectfully submitted,

WILLIAM H. FERRELL  
314 North Broadway  
St. Louis, Missouri 63102  
Counsel for Petitioner

STEWART W. SMITH, JR.  
and  
SCHLAFLY, GRIESDIECK, FERRELL  
& TOFT  
Of Counsel